UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

SMYRNA READY MIX CONCRETE, LLC	:	CASE NO. 09-CA-251578
	:	09-CA-252487
	:	09-CA-255573
and	:	09-CA-258273
	:	
GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS	:	**RESPONDENT'S REPLY IN SUPPORT OF ITS EXCEPTIONS AND REPLY TO THE UNION'S ANSWERING BRIEF**

Respectfully submitted,

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I. Introduction

Smyrna Ready Mix Concrete, LLC submits this Reply Brief in support of its Exceptions and Brief in Support ("Exceptions Brief"). This matter arose after SRM terminated Winchester Driver Sunga Copher ("Copher") for his excessive overtime hours and negative attitude in refusing to travel to assigned plants, and termination of Winchester Plant Manager (Copher's Uncle) Aaron Highley ("Highley"), for failing to effectively manage his Drivers' labor hours and efficiencies, which led to negative revenues and the closure of the Winchester Plant. In his ruling, the ALJ ignored substantiated facts, twisted the record to fit his reasoning, and ignored and/or misapplied applicable law in finding that SRM violated the Act in various ways. Like the ALJ, the Union's Answering Brief ("Response"), follows this same pattern.

II. The ALJ erred in finding that Copher's termination violated Sections 8(a)(1) and 8(a)(3) of the Act.

Hoping to shield the ALJ's Decision from appropriate review, the Union's Response misconstrues both SRM's Exceptions and the ALJ's reasoning. The Union mischaracterizes SRM's strong arguments undermining the ALJ's reasoning, calling them mere credibility attacks to try to benefit from the deferential standard of *Standard Dry Wall Products*, 91 NLRB 544 (1950). (Union Response ("UR") p. 2). The Union brushes aside the record evidence, noted by SRM, that the ALJ discredited all evidence supporting SRM's position, with but one example from the record of the ALJ discrediting a General Counsel's ("GC") witness, namely Highley. The Union notes that the ALJ "declined to credit any purely self-serving testimony from…Highley". (*Id*). But the Union ignores the ALJ's very next sentence, in which he confesses to crediting Highley's self-serving testimony over any testimony of SRM's witnesses. (ALJD 7:6-9). The Union's sole example shows the absurdity of the ALJ's credibility determinations, which are not due any deference, as explained in the Exceptions Brief.

One of SRM's primary objections to the ALJ's credibility determination is the finding that the GC satisfied its *Wright Line* burden to establish that SRM (specifically, Ben Brooks) knew about Copher's union activities, had animus against such activity, and terminated Copher as a result, which then served as the claimed catalyst for SRM's allegedly unlawful subsequent conduct. (ALJD 18:21-30). The Union summarily states that "the record is rife with evidence regarding Copher's union activities and Respondent's knowledge of it," but the Union provides no citation to any record evidence to support this bald assertion. (UR p. 8). With the exception of Long on rebuttal, no GC witness testified that they had discussed *any* union activities with SRM management. In fact, Copher testified that he went so far as to lie about any such conduct, denying any union activities when asked by his uncle and supervisor Highley, which lie was consistent with Palmer's direction to the Drivers to deny organizing activities if asked. (Tr. 59). Even Long, the *only* GC witness who claimed to have discussed the union with any manager (but not with Brooks), admitted that she did not mention Copher's name during her conversation with Chasteen. (Tr. 1689). The record is NOT "rife" with such evidence, but to the contrary, the record is devoid of evidence that SRM management knew of Copher's union activities. There is simply no set of facts to reconcile the ALJ's determination that SRM terminated Copher for a meeting that SRM did not know had occurred and did not know Copher had attended.

The Union's analysis of the ALJ's inferred animus as being proper is equally wrong. As an initial point, the Union wholly, and conveniently, overlooks SRM's longstanding history with the union, its voluntary purchase of a union facility, and its hiring of Drivers off the picket line. (Tr. 1081-82, 1558-61). Instead, the Union relies solely upon the timing of Copher's discharge and its reference to "euphemisms" as code for anti-union animus. (UR p. 5). That the Union's position rises and falls on the date of Copher's discharge, which was the same date Brooks learned of

Copher's excessive overtime hours (double the amount of his counterparts who complained), and the hope that innocuous words "culture," "attitudes," "drivers only" and "we're all in this together" will be construed as inferring anti-union animus, is particularly informing of the lack of any real record evidence to support the ALJ's inference of anti-union animus. (*Id*.). As the record shows, the Winchester Drivers were not go-getters by any means. The record actually is "rife" with evidence that many of the Drivers were reluctant (indeed some outright refused) when directed to support the Florence plant. (Tr. 676, 782-87). Even at their own plant, the Drivers balked at proactively pulling under the hole to load for the plant to remain efficient (and profitable). (Tr. 1345-46). Such behavior undermines any argument that using terms like "culture" and "attitudes" is code for anti-union bias. The Union attempts to fault Brooks for not brow-beating Copher with every instance of misconduct during his termination meeting, and instead providing a more general reason for his termination – negative attitude and poor job performance. (UR p. 5). Yet, had Brooks been more precise (and direct) with his language, with words like lazy, unmotivated, disobedient, and insubordinate, the Union would have made the same animus argument from these "code" words, coupled with what the Union would characterize as Brooks' "harsh" language.

III. The ALJ erred in finding that Highley's termination violated Section 8(a)(1) of the Act.

The sole issue on Highley's termination is whether SRM discharged Highley for refusing to commit an unfair labor practice, which is the only means by which Highley could be protected under the Act as a supervisor. *See Parker-Robb Chevrolet, Inc.,* 262 NLRB 402, 403 (1982). Yet, the Union has identified no record evidence supporting the ALJ's finding of liability. Even crediting all of Highley's "self-serving" testimony, Highley at most was asked by Brooks to prepare a list of union supporters – i.e., write a list of names on a piece of paper. (Tr. 753). The

Union has not pointed to any Board authority holding that either this request, or Highley's termination for failure to adhere to this request, constitutes an unfair labor practice.[1]

A company's attempt to assess union support is not unlawful, as long as it is done through legal means. The record contains no evidence that Brooks asked Highley to surveil, poll, or interrogate the employees regarding their union activities, contains no evidence that Highley did so, and contains no evidence that any Driver knew that Brooks had asked Highley to make a list of names. The Union, like the ALJ, continues to ignore *Spring Valley Farms,* 272 NLRB 1323 (1984), which has facts nearly identical to this matter. There, a supervisor was asked to do more than what Brooks allegedly asked Highley to do here; there, a supervisor was directed to talk to drivers to see if they were voting in favor of a union prior to an election; the supervisor refused and was terminated. *Id*. at 1328. The Board found the supervisor's termination was ***not*** unlawful because she was asked to "talk" to employees to ascertain their union inclinations, not to issue any threats or promises, and there was no evidence any employees were aware of this request or would link her discharge to that refusal. *Id*. at 1328, 1332. Here, the facts are even less egregious. Highley does not even claim he was asked to "talk" to the Drivers; rather, he only claims that he was asked to make a list, and Highley does not allege any employees knew of this request or of his refusal. (Tr. 753). As the Union acknowledges, "termination must stand or fall on the reasons given at the time of termination," and the reason provided to Highley was that SRM was "going in a different direction." (UR p. 8).[2]

[1] Contrary to the Union's assertion, Highley's unemployment documents do not support Highley's claim that he was fired for his refusal to prepare a list. The documents state that Highley received a "verbal coaching" on November 11, 2019 and was terminated one week later. (Union Ex. 13). Even crediting Highley's version of events, the conversation where Brooks allegedly asked him to compile a list was on November 8th, not on November 11. (Tr. 753).

[2] The Union distorts testimony by arguing that employees began to keep quiet about the union after Highley's termination because "they didn't want to risk [their] jobs." (UR p. 10). This statement was made while discussing Copher's termination, not Highley's. (Tr. 432). The Union similarly distorts James Goss' testimony about employees being scared of losing their jobs after Copher and Highley were terminated. This testimony had nothing to do with the employees feeling the need to keep quiet about union activities for fear of losing their jobs, and the very next question

IV. The ALJ erred in determining that Brooks unlawfully gave the Winchester Drivers $100 in cash, and unlawfully solicited grievances on November 15 in violation of Sections 8(a)(1) and 8(a)(3).

Contrary to the Union's assertion, neither the record evidence nor the relevant case law supports the ALJ's finding that Brooks giving the Winchester employees $100 in cash violated Section 8(a)(1) of the Act. The cases on which the Union relies are distinguishable because in those cases, the conferral of benefits occurred either (a) while a representation election was pending, that is, during the critical period (unlike here), or (b) the conferral of benefits was coupled with strong evidence of brazen employer efforts to influence employees' union support (likewise not the case here). Further, the record evidence shows both a credible "legitimate business reason" for the safety bonuses and an established past practice. *Holly Farms Corp.*, 311 NLRB 273, 274 (1993). Brooks testified the safety bonuses were meant "to boost morale," hoping the bonuses would motivate the Drivers to deliver concrete as requested. (Tr. 1111-12). SRM also presented evidence that Brooks himself had engaged in this practice on at least nine other occasions in 2019 (R. Ex. 91), and testimony showed this practice goes back over 20 years (Tr. 1572-73).[3]

As previously noted in SRM's Exceptions Brief, an employer can rebut any inference of an implied promise to remedy grievances in violation of the Act by establishing a past practice of soliciting grievances in a like manner prior to the critical period. The ALJ incorrectly discredited all of SRM's evidence establishing this past practice, without logical reason. One of the GC's own

in that testimony confirms the same. (Tr. 957-58). Winchester is a small plant, and of course any terminations would be expected to cause employees to be concerned.

[3] The Union's reliance upon *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964) for the "fist inside the velvet glove" argument is simply unsupportable on this record. In *Exchange Parts Co*., the employer not only granted benefits while a representation election was pending, an important distinction from the instant case, but the benefits of a floating holiday, the grant and announcement of overtime and vacation benefits were also coupled with unabashed statements by the employer such as '[t]he Union can't put any of those things in your envelope—only the Company can do that" and "(I)t didn't take a Union to get any of those things." 375 U.S. at 406-407. There is simply no comparison to the facts here, wherein Brooks did not so much as mention the word "union", must less imply that either future benefits would be forthcoming if the Winchester drivers did not unionize or that such benefits would disappear if the employees chose to unionize.

witnesses, testified that he had attended 4-5 meetings with Brooks in Winchester, and that each time Brooks asked the drivers what they needed around the plant and how things were going. (Tr. 599-600). The Union's argument (not surprisingly) ignores this testimony, and their silence speaks volumes. Contrary to the Union's assertion, the issue is not whether employees ever took Brooks up on his offer to contact him, it is whether Brooks had previously made that offer to the same employees – which the GC's own witness confirmed was true, and which is the point of Brooks' cell phone number being posted at the plant. (UR p. 6).

V. The ALJ erred in concluding that SRM violated Section 8(a)(1) and (3) of the Act by closing Winchester and terminating the remaining Drivers.

SRM produced unrefuted records showing that the Winchester Plant had the lowest EBITDA (by a wide margin) and that its poor productivity and labor costs ran contrary to SRM's business model requiring efficiency. (R. Ex. 9). The Winchester Plant had the lowest EBITDA of any Central Kentucky Region ("CKR") in 2019. (*Id.*). The Union urges the Board to ignore SRM's argument regarding EBITDA as a call to focus on "complicated-sounding accounting principles and ignore the simple and obvious facts." (UR p. 12). Yet, there is nothing complicated about EBITDA, and there is nothing simple or obvious about the Union's "facts." EBITDA is a straight forward accounting term that is undoubtedly used by all businesses. What the Union really seeks is for the Board to ignore a universally accepted accounting principle, which shows without dispute the lack of profitability of the Winchester Plant, and to force a company to continue operating an unprofitable plant because, some 2 months prior, 2-3 employees had met with a union representative. The Union's argument overlooks not only the poor EBITDA, but also the timing of SRM's plant-closing decision, which occurred at fiscal year-end 2019. SRM did not decide to shut down the Winchester Plan on some random day in April or July; rather, SRM determined to close the plant only after the close of its 2019 fiscal year. And, the Union's argument overlooks

that SRM had made repeated efforts to turn plant operations around. SRM added additional Drivers, sent Drivers to Florence, terminated Highley, and sent three managers to rehabilitate operations at Winchester. (Tr. 997, 1117-18, 1206-07). Nothing worked. That Copher and maybe 2-3 other employees met with the Union to discuss potential organization does not insulate the Drivers against their failures, and that activity does not require SRM to sustain ongoing financial losses. Contrary to the Union's assertion, SRM certainly had a legitimate reason to close the facility, and perhaps the most compelling reason of all – the plant was losing money.[4] (R. Ex. 9). The Union cannot establish a violation of the Act under pursuant to *Wright Line* on these facts.

Further still, the Union's argument based on *Darlington* fails because the record does not support what *Darlington* requires for a violation. The record contains no evidence, and the Union has not cited to any, showing any "chilling" of activity among the Winchester Drivers or the remaining SRM employees. Rather than assert any proof, the Union focuses instead on SRM's purported characterization of the "nascent" organizing campaign as "dead." (UR p. 14). SRM did not make that characterization. Rather, SRM explained in its Exceptions Brief that John Palmer, the union official overseeing the Winchester Driver's alleged activities, so testified that the campaign was "done." (Tr. 376). The characterization came from the Union's own witness, not SRM. The Union's argument, denying a "dead" campaign, also fails because its premise is based upon layers of pure speculation. The Union's speculation that the Winchester Drivers speculated that Copher or Highley were terminated as the result of union activities (without any testimony to

[4] The Union's argument regarding the performance of the Winchester Drivers and the Florence trips being voluntary is nonsensical, and quite frankly, a gross mischaracterization of the record evidence. (UR p. 13). Highley, the Winchester Plant Manager, confirmed at the hearing that the Florence trips were mandatory. (Tr. 831). How he selected Drivers was first based on whether a Driver volunteered to go. (Tr. 830). Asking for a "volunteer" to complete a mandatory task does not make the entire task voluntarily. And, if an employee refused to go, Highley was instructed to start from the bottom of the seniority list and assign the route, and to fire anyone who refused. (Tr. 492). This instruction was overheard by several Winchester Drivers, and was communicated by Highley. (*Id.*). This is hardly voluntary work, and the Union's use of semantics within this argument is borderline frivolous.

that effect from any witness) is not supported, and also does not insulate the Drivers, as argued by the Union, and does not demonstrate any ongoing union campaign. (UR p. 14). That result would be absurd. The record contains **no** testimony that any employee – either in Winchester, or at any other plant – was seeking to organize at or near the time of the plant closing, and contains **no** testimony that any employee – either in Winchester or in any other plant – believed a campaign was ongoing. There is no evidence of any alleged "chilling" intent or purpose whatsoever, as required by *Darlington*.

VI. The ALJ erred in determining that the Agreements signed by 6 employees on January 13, 2020 were unlawful.

The employees' actions speak for themselves in how they interpreted the separation agreements; four out of the six employees who signed the Agreements cooperated with the Board's investigation, provided affidavits, and testified during the hearing. The GC's witness, Long, testified that she was "not concerned at all" about participating in the board's investigation of this case. (Tr. 205). While Sheldon Walters may have believed he could be sued for talking bad about SRM, that did not prevent him from meeting with an NLRB investigator, providing an affidavit, and testifying in this case. (Tr. 450-51). There is no evidence that any of SRM's employees believed that they were giving up their Section 7 rights by signing the Agreements.

Further, the Union skims over the fact that *Baylor University Medical Center*, 369 NLRB NO. 43 (2019) overruled (or at a minimum, significantly narrowed) the rulings in the cases of *Shamrock Foods Co*., *Clark Distribution Systems*, and *Metro Networks*. The facts here align with those in *Baylor* as explained in SRM's Exceptions Brief. All parties agree that the Agreements were not mandatory, and applied only to postemployment activities. The only remaining question is whether the Agreements were proffered under lawful circumstances, and the evidence clearly establishes that the circumstances were lawful. No union activity had occurred for two months

prior to SRM offering the Agreements, the employees had no obligation to sign the agreements, and even if they did, the clear language in the agreements would not lead any reasonable employee to conclude they would be prohibited from participating in a government investigation and making a good faith report to any government agency with oversight over the company. (G.C. Exs. 3-4, 11, 19-21). Any alternate reading of the Agreements is contrary to the plain language contained in the agreements themselves, as well as the testimony of the GC's witnesses.

VII. The ALJ's recommended Order cannot be enforced.

Forcing SRM to reopen the Winchester plant is an improper remedy that would be unduly burdensome.[5] The Union fails to address SRM's argument that the ALJ's extraordinary remedy of forcing SRM to reopen the Winchester plant is neither routine nor supported by adequate factual justification. *RAV Truck and Trailer Repairs, Inc.,* 369 NLRB No. 36 at n. 3 (2020). As such, the Board's remedy should be tailored based upon "the nature and extent of the violations." *See Hickmott Foods, Inc.*, 242 NLRB 1357. Instead, the Union incorrectly argues that SRM has "continued its operations at Winchester since January 10, 2020" as a purported rationale for ordering a reopening. (UR p. 17). Yet, this argument ignores SRM's testimony that Drivers only load their trucks from the Winchester plant on rare occasions if needed for a nearby job (i.e., an on-demand operation). (Tr. 1125). In fact, the work previously performed by the Winchester Drivers has been fully absorbed by sister plants with the addition of only one new driver. (Tr. 1219).

The Union argues that SRM did not establish that Copher would have been terminated based upon the after-acquired evidence showing his three no-call/no-shows. The record says otherwise. SRM's policy calls for termination after the second no-call/no-show, and Copher

[5] SRM did not file exceptions to, or go into detail in its Exceptions Brief, regarding the many reasons why the plant reopening would be unduly burdensome, as the ALJ reserved that issue for the compliance proceedings.

engaged in that behavior, even based on his uncle's records, which Highley kept secret and failed to report to HR, showing that even Highley knew the serious consequence of his nephew's misconduct – that his nephew would be terminated, especially given his self-serving and unbelievable excuses. (Tr. 1043-54; R. Exs. 1, 80). *See Marshall Durbin Poultry Co.*, 310 NLRB 68, 70 (1993). SRM established that Copher was either "unfit for service or a threat to efficiency in the plant." (UR p. 17).

Next, the Union baldly asserts, without any record evidence or supporting case law, that "there is no legitimate reason to limit the remedy in this case" with regard to the reinstatement of Highley. (*Id.*). Respectfully, SRM has produced ample evidence of Highley's failure to follow SRM's procedures (i.e., legitimate reasons) precluding this remedy, including, without limitation his failure to input data in SRM's computer system, failing to require his Drivers to follow SRM's loading procedures, and failing to pass on paperwork to Human Resources regarding violation of policy by the drivers). (Tr. 807-08, 1054, 1113). Placing Highley back in charge of the plant would require SRM to abdicate control of the facility – hardly a remedy tailored to the nature of the alleged violations.

Finally, the Union disputes SRM's exception to reinstatement of the other six employees who signed separation agreements. In doing so, the Union relies upon the analysis in *A.S.V. Inc.*, 366 NLRB No. 162, slip. Op. (Aug. 21, 2018), but *A.S.V.* involves drastically different facts than those in this case and is contrary to *Baylor*. The case of *BP Amoco Chemical-Chocolate Bayou*, 351 NLRB 614 (2007) is much more comparable to the facts of this case in its application of the *Independent Stave* factors. [6]

[6] Interestingly, the Union argues that it did not agree to be bound by the agreement, and that Teamsters organizer John Palmer failed to advise the drivers to revoke their agreements. (UR p. 18). Yet, Mr. Palmer's failure is precisely why the Union's alleged lack of consent should be given little, if any, weight under *Independent Stave*.

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of December, 2020, a copy of the foregoing was filed electronically with the NLRB and copies of same forwarded via e-mail to:

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